Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WWOR-TV, INC.,

Petitioner,

v.

LOCAL 209, NABET-CWA, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DON T. CARMODY
Counsel of Record
DON T. CARMODY, ESQ., P.C.
Attorney for Petitioner
P.O. Box 837
16 Lower Byrdcliffe Road
Woodstock, New York 12498
(914) 679-4500

151576

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

81pp

QUESTION PRESENTED

Whether an arbitrator's express reliance upon evidence elicited while the arbitrator served as a mediator, during contemporaneous alternative dispute resolution conducted by the arbitrator with the arbitrating parties, constitutes prejudice, *per se*, warranting vacating of the arbitrator's award?

PARTIES TO THE PROCEEDING

Petitioner

The Petitioner, WWOR-TV, Inc., has the following corporate parents in ascending order: Pinelands Broadcasting, Inc., Pinelands, Inc., BHC Communications, Inc., Chris-Craft Broadcasting, Inc. and Chris-Craft Industries, Inc.

Respondents

In addition to Local 209, NABET-CWA, AFL-CIO ("Local 209"), the Respondent named in the caption, the National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO ("NABET-CWA") was joined as a Respondent below by an Order of the United States District Court for the Southern District of New York, dated June 25, 1997, approving a joinder stipulation among WWOR, Local 209 and NABET-CWA.

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Petitioner, WWOR-TV, Inc. ("WWOR") respectfully requests that a writ of certiorari be issued to review the judgment below of the United States Court of Appeals for the Second Circuit ("Court of Appeals").

OPINIONS BELOW

The Court of Appeals issued its unpublished opinion on December 1, 1998 (App. A). The United States District Court for the Southern District of New York (John G. Koeltl, *J.*) ("District Court") issued a written order on March 19, 1998 (App. B), confirming the District Court's oral ruling rendered at the conclusion of a hearing conducted on opposing motions for summary judgment on March 12, 1998 (App. C). The court opinions below concern the review of three related arbitration awards rendered by Arbitrator Joan Parker ("Arbitrator"): (1) An Interim Opinion and Award denying a motion filed with the Arbitrator by WWOR, dated October 14, 1995 (App. F); (2) An Opinion and Award on the merits, dated September 12, 1996 (App. E); and (3) An Opinion and Award issuing a remedy, dated February 13, 1997 (App. D).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered and filed on December 1, 1998 (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Arbitration Act

The United States Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, provides in § 10, in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> * * *
>
> (3) Where the arbitrators were guilty of . . . any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers . . .

STATEMENT OF THE CASE

The fundamental question in this case is whether the award of the Arbitrator should be vacated because she expressly relied upon evidence in rendering her awards which was the product of mediation conducted by the Arbitrator while serving in the dual capacity of mediator for the arbitrating parties. The issue arises in the context of competing motions to vacate or confirm the Arbitrator's several awards. To fully appreciate the significance of the issue presented by this case, it is essential to consider, in addition to the court proceedings below, the mediation and arbitration proceedings conducted by the Arbitrator, inasmuch as the regularity of the arbitration proceeding is being specifically challenged by WWOR.

A. The Arbitration

Background of the Arbitration

WWOR operates television station WWOR-TV (commonly known in the Metropolitan New York area as "Channel 9") located in Secaucus, New Jersey.

WWOR had an established collective bargaining relationship with NABET-CWA and its Local 209, which was memorialized in a collective bargaining agreement between WWOR and NABET-CWA effective to and including the 31st day of October, 1993 ("1990-1993 Agreement").

On April 23, 1993, WWOR laid off nine employees represented by the Union.[1] On May 10, 1993, the Union filed a Grievance ("Grievance") in which it alleged that WWOR had violated the 1990-1993 Agreement by failing to reinstate, in the inverse order of seniority, employees involved in the layoff. Thereafter, on May 24, 1993, the Union filed a Demand for Arbitration with the American Arbitration Association ("Association"), submitting the Grievance to arbitration ("Arbitration").

The Pre-Mediation Arbitration

The Arbitrator conducted Hearings on December 28, 1993, and June 8, 1994, an official stenographic record of which was recorded and transcribed. At the outset of the June 8th Hearing, WWOR submitted to the Arbitrator a Motion To Dismiss For Lack Of Arbitrability, And, In The Alternative, A Motion *In Limine*. The Arbitrator denied WWOR's Motion to Dismiss, and failed, without explanation, to ever rule on WWOR's Motion *In Limine*.

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1. NABET-CWA and its Local 209 are referred to jointly as the "Union", for convenience.

The Mediation

Thereafter, during the course of the June 8th Hearing, the parties engaged in off-the record discussions, and requested the Arbitrator to serve as a mediator ("Mediator"), to assist in their efforts to resolve the Grievance.

The parties agreed that the Arbitrator would retain arbitral authority over the Grievance if attempts to mediate the case failed, and further agreed, most importantly, that neither party would be prejudiced in any manner by participating in the Mediation process (App. A at 7a). In this regard, Counsel for WWOR stated, and the Arbitrator and the Union through its Counsel agreed, that "*the conduct of mediation on the part of the arbitrator would in no way prejudice* either [WWOR] or [the Union] in our presentation of the case or our defense of the case." (Emphasis added) (App. A at 3a). The official record of the June 8th Hearing records that the Arbitrator concurrently and specifically noted that "[n]either party is *waiving* its legal position as to any matter in dispute as a result of the mediation effort." (Emphasis added).

The parties subsequently appeared before the Arbitrator in her capacity as Mediator on June 9 and 23, and August 17, 1994. During the course of these three Mediation sessions, the parties revealed certain documents to the Mediator and made various statements in support of their respective positions concerning the Grievance. Among the documents submitted to the Mediator were questionnaires which had been developed jointly by the parties during Mediation, for the purpose of assessing the economic impact which may have been sustained by the laid-off employees (App. A at 4a; App. D at 28a).

The Post-Mediation Arbitration

The Parties were scheduled to continue Mediation on January 25, 1995. However, the Union announced as the Mediation session commenced on that date that it was abandoning further efforts to mediate, and the Arbitrator resumed the Arbitration immediately.

Inasmuch as both WWOR and the Arbitrator had planned to continue in mediation at the January 25th session, no prior arrangements had been made to take a stenographic record of that day's proceedings; thus, no official stenographic record was recorded or transcribed of the January 25th Arbitration session.

Immediately upon announcing its abandonment of further efforts to resolve the Grievance through Mediation, the Union rested its case-in-chief at the January 25th Hearing. The Union did not present any testimony prior to resting its case-in-chief. The only documents made a part of the arbitral record prior to the Union's resting its case-in-chief were a copy of the Grievance, a copy of the Demand for Arbitration, and a copy of the 1990-1993 Agreement (App. A at 3a).

Thereafter, on March 17, 1995, WWOR filed a second Motion to Dismiss, in which WWOR argued, in essence, that the Union had failed to present a *prima facie* case, in that the Union had failed to present any testimony or documentation in support of its Grievance, and was relying solely on legal theories espoused only orally by its Counsel during the Arbitration. The Union filed a response to the Motion to Dismiss on April 5, 1995, asserting that it had established a *prima facie* case.

The Arbitrator's Interim Opinion

On October 14, 1995, the Arbitrator issued an Interim Opinion denying WWOR's Motion to Dismiss (App. F). In support of her denial, the Arbitrator relied on certain factual representations which had come to her attention through on-the-record statements of counsel, rather than through testimonial or documentary evidence presented through witnesses. In this regard, the Arbitrator noted

> It is the Arbitrator's conclusion that based upon the Record established thus far in this proceeding, particularly lengthy on-the-record discussions between the parties' counsel as to what was at issue, the Union has established a *prima facie* case.

(App. F at 50a).

The Arbitrator rested her *prima facie* holding on the singular finding that, as a matter of fact, the employees laid off by WWOR had been re-hired the day following their layoff to perform their same jobs:

> The fact that the very same employees who were laid off were *hired the next day to perform their former job functions within the same job grouping from which they were laid off* establishes a *prima facie* case.

(Emphasis added) (App. C at 16a; App. F at 50a).

The Resumed Arbitration

The Arbitration resumed on May 28, 1996, at which time WWOR rested its defense, without producing any testimony or further documentation. Upon learning of WWOR's intention

to rest its defense, the Union requested the opportunity to present testimony. Rather than allow Union testimony, the Arbitrator peremptorily rendered an oral award, sustaining the Grievance on the basis of the Interim Opinion, and declaring the record of the Arbitration closed.

The Arbitrator's Award On The Merits

On September 12, 1996, the Arbitrator issued an Opinion and the Award in furtherance of her May 28th oral declaration in which she sustained the Grievance ("Merit Award"), and directed that another Hearing be scheduled for the purpose of formulating a remedy ("Remedy Hearing") (App. E).

The Remedy Hearing

Following the issuance of the Arbitrator's Merit Award, WWOR notified the Association, the Arbitrator and the Union in writing on October 16, 1996, that it was proceeding in court to vacate the Merit Award, and that it declined to participate in the Remedy Hearing, if conducted.

Thereafter, on December 23, 1996, WWOR provided the Arbitrator, through the Association, with a copy of WWOR's initial Complaint filed with the District Court.

On December 27, 1996, WWOR notified the Association that it would not appear for the Remedy Hearing, which had been scheduled in the meantime for December 30, 1996, and although the Remedy Hearing proceeded on December 30th, WWOR did not appear. However, an official stenographic record of the Remedy Hearing was recorded and transcribed ("Remedy Record").

The Remedy Record records that during the Remedy Hearing, the Arbitrator received into evidence, as "Union Exhibit 5", certain questionnaires which had been distributed to the laid off employees to elicit certain information regarding their employment histories, the circumstances of their lay-offs, and any interim employment or re-hire by WWOR, if applicable. The Arbitrator also received into evidence a document marked for identification in the arbitral record as "Union Exhibit 4 R", consisting of a summary prepared by the Union of the information contained in the questionnaires, augmented with testimony elicited from Brian E.W. Wood, the President of Local 209. The Arbitrator also received into evidence certain documentation obtained from WWOR *during the Arbitration Mediation*, in the form of memoranda to payroll regarding the employees in question. The Remedy Record further records that Mr. Wood testified that the questionnaires had been prepared by WWOR's counsel in the Mediation process, then transmitted to the Union's counsel, "in an attempt to mediate this case." The Remedy Record also records that Mr. Wood testified that the questionnaires were the *primary source material* in the creation of "Union Exhibit 4 R" (App. D at 28a and 29a). The above-described questionnaires were among the documents disclosed to the Arbitrator during the course of Mediation.

The Arbitrator's Remedy Award

On February 13, 1997, the Arbitrator issued an Opinion and the Award (the "Remedy Award"), formulating a remedy based mainly upon the above-described questionnaires and Mr. Wood's testimony regarding the questionnaires, work schedules, *other documentation provided by WWOR*, and personal interviews with the individuals who completed the

questionnaires, but whose responses were either incomplete or unclear (App. D at 28a). The Arbitrator specifically recognized the fact that the questionnaires had been developed by the parties during the Mediation process, while hope prevailed that an amicable resolution could be negotiated (App. C at 17a; App. D at 28a and 29a).

B. The Proceedings Below

On March 19, 1998, the District Court issued a written order affirming the Arbitrator's awards (App. B), confirming the District Court's oral ruling of March 12, 1998, rendered immediately upon the conclusion of oral argument on the parties' opposing motions for summary judgment (App. C). WWOR had initiated the underlying action in the District Court pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), and § 9 of the United States Arbitration Act, 9 U.S.C. § 9, seeking to vacate both the Arbitrator's Merit Award and her Remedy Award. WWOR advanced two pertinent arguments to the District Court: (1) That the Arbitrator had conducted an irregular proceeding, citing 9 U.S.C. § 10(a)(3); and (2) That the Arbitrator had exceeded her powers, citing 9 U.S.C. § 10(a)(4). The District Court held that the Merit Award should be enforced as it drew its essence from the 1990-1993 Agreement, and that WWOR, by choosing not to proceed with proof other than statements of its counsel following the Union's resting its case-in-chief, was precluded from attacking the Merit Award (App. C at 22a). Continuing, the District Court rejected WWOR's argument that the Arbitrator, in rendering her Remedy Award, alone, had relied improperly upon evidence (in the form of the questionnaires and testimony about the questionnaires) elicited during Mediation. The District Court concluded that because the Mediation

> information on which the Arbitrator relied came from the [laid off employees] themselves, and the

> Union would have had access to the [laid off employees] to present the very same information to the Arbitrator at the remedy hearing,

the Remedy Award should be enforced as it could not be said to lack colorable support (App. C at 22a). The District Court further held, relative to the Remedy Award, alone, that WWOR had "waived" its right to challenge the Arbitrator's reliance upon Mediation proof by its decision not to attend the Remedy Hearing (App C at 23a).

The District Court did not rule separately or specifically upon WWOR's claim that the Arbitrator had conducted an irregular proceeding by basing her awards in material part upon evidence adduced during Mediation, nor that the Arbitrator had exceeded her powers in considering information which must have been revealed in Mediation in issuing the Merit Award.

The Court of Appeals issued its opinion on December 1, 1998, affirming the District Court (App. A). The Court of Appeals rejected WWOR's contention that, as to the Merit Award, the District Court and the Arbitrator had improperly afforded evidentiary value to statements of counsel, in light of the absence of documentary and testimonial evidence. As for the Arbitrator's reliance upon proof adduced during Mediation, the Court of Appeals also affirmed the District Court, declining to accept WWOR's argument that a *per se* rule of prejudice should govern where Mediation evidence is relied upon expressly, and holding that WWOR had failed to demonstrate that the Arbitrator's use of such evidence actually was prejudicial (App. A at 8a). In so holding, the Court of Appeals endorsed the District Court's view that WWOR's challenge failed because "the same information still would have been required during the remedy phase, and the Union would have collected it without WWOR's participation." (App. A at 8a).

However, the Court of Appeals did not adopt the District Court's finding that WWOR's absence from the Remedy Hearing constituted a "waiver" of its ability to challenge the Arbitrator's reliance upon Mediation proof in issuing a remedy. Additionally, the Court of Appeals did not squarely meet WWOR's contention that the Arbitrator's Merit Award also relied upon information gleaned by the Arbitrator during Mediation; to wit, that the laid off employees had been rehired the day following their layoff to perform their same duties. Moreover, the Court of Appeals did not address WWOR's argument that, considering that the Arbitrator expressly relied upon some fruits of Mediation, it was impossible to know the full extent to which the Arbitrator may have been influenced by unmentioned information gleaned in Mediation.

REASONS FOR GRANTING THE WRIT

The issue burning at the core of this case could be no more crystalized. There has been no finding below, and the Union has never contended, that the Arbitrator did not invade the Mediation process and expressly rely, in her adjudication of rights, upon information gleaned while serving as Mediator. Contrariwise, first the Arbitrator conceded, and then the District Court followed by the Court of Appeals literally recognized, that proof elicited during the Mediation was appropriated by the Arbitrator, at least in her fashioning of the remedy. Thus, this is not a case where the issue had become whether WWOR could show that the Arbitrator actually usurped Mediation confidences in rendering a decision. Furthermore, there has been no disagreement over the sanctity of mediation as being integral to its vitality as a means of alternative dispute resolution. The Union acknowledged in its brief to the Court of Appeals that "The give and take of mediation and the open discussion of legal positions and each side's 'bottom line' must remain off-limits or mediation would not be possible." Instead, this has

been a case of "relativity" — specifically, the degree to which, if at all, a trier of fact may breach mediation confidences in the final adjudication of rights.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF THE FEDERAL LAW OF ALTERNATIVE DISPUTE RESOLUTION WHICH HAS YET TO BE, BUT SHOULD BE, DECIDED BY THIS COURT

WWOR's petition for writ of certiorari should be granted because the opinions below have decided, as a matter of federal labor law, that some breaches of mediation are permissible in defining a participant's ultimate legal rights, depending upon the precise nature of the mediation disclosures eventually compromised.

The Court of Appeals declined to adopt the *per se* prohibitory rule argued by WWOR, and rejected WWOR's claims of mediation prejudice by holding that the Mediation information utilized did not come from WWOR, but rather from the laid off employees, even though the documents containing the information were jointly created during Mediation. The Court of Appeals did not squarely address WWOR's contention that the Arbitrator's specific, determinative factual finding in her Interim Opinion that the laid off employees had been re-hired immediately to perform their former jobs must have become undisputed (if at all) during Mediation. Rather, the Court of Appeals focused upon the Arbitrator's reliance upon the questionnaires distributed to the laid-off employees which the parties had mutually constructed during the Mediation, finding that WWOR had "fail[ed] to show that the use of that evidence was *prejudicial*." (Emphasis in original) (App. A at

8a). Thus, the opinion below rests upon the nature and source of the evidence borrowed by the Arbitrator from Mediation.

WWOR is unaware of any case in which this Court has been called upon to consider the standard which should govern when, if ever, a mediator may breach the confidentiality of the mediation process.

Mediation is the flagship in the burgeoning industry of alternative dispute resolution. Universally, the judiciary has embraced the alternative dispute resolution concept as an economical, expeditious alternative to much litigation, by actively encouraging, if not outright mandating, an early resort by litigants to mediation. Moreover, mediation has become increasingly familiar throughout society, sometimes offering the only affordable means of resolving disagreements, managing to diffuse controversies ranging from marital to boundary. However, there is perhaps no arena of society where the use of mediation is as ancient, integrated and crucial as it has become in labor relations.

Countenance of a breach of the mediation process, however slight, casts an immeasurable shadow of doubt upon the trust labor adversaries, and partners, alike, traditionally have been willing to place in this hallmark of alternative dispute resolution.

WWOR's petition for a writ of certiorari should be granted so that the Court may affirm the importance of jealously safeguarding the sacrosanct confidentiality of mediation, and so that it may confirm for the first time that no degree of compromise of mediation disclosures may be tolerated if mediation is to fulfill its promise.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONSTITUTES SUCH A DEPARTURE FROM THE ACCEPTED COURSE OF PRESERVING THE INTEGRITY OF MEDIATION THAT THIS COURT'S SUPERVISION IS REQUIRED

WWOR's petition for a writ of certiorari should be granted because the opinions below constitute an extreme, inexplicable departure from the protections usually afforded by judicial proceedings to the process of mediation, beseeching the exercise by this Court of its supervisory power over the judiciary.

The opinion below permitted the Arbitrator's appropriation of Mediation disclosures, rationalizing that a mediation breach is allowable for so long as the information seized from mediation had not been revealed in mediation by the complaining party.

The accepted and usual course of judicial proceedings in preserving the sanctity of mediation, while not evident from cases decided by this Court, can be harvested from judicial rules, legislation governing judicial proceedings, and the decisions of other courts, including precedent of the Court of Appeals and the District Court.

Federal courts throughout the country, as well as the New York courts, have consistently recognized that in order to be an effective and attractive substitute for litigation, the mediation process, and that which evolves from it, must be cloaked with confidentiality, as an inducement to the productive candor which is its earmark.

A strong pronouncement representative of the normal deference paid by the courts to mediation disclosures can be

found in the recent case of *Willis v. McGraw, Jr.*, 177 F.R.D. 632 (S.D.W.V. 1998). In *Willis*, the court articulated a strict "bright-line rule" to ensure the absolute confidentiality of mediation conference proceedings pursuant to a local rule: "the Court will not involve itself *under any circumstances* in sorting out disagreements amongst the parties emanating from the mediation process." (Emphasis supplied) 177 F.R.D. at 633. In declaring this rule, the Court made several additional, equally compelling pronouncements on the secrecy of mediation efforts. First, in speaking about the reasons underlying the creation of the Court's local mediation rule, the Court maintained that the rule was drafted to

> ensure confidentiality, to reassure the parties and counsel that they would suffer no prejudice, perceived or actual, as a result of the full, frank, conciliatory, and sometimes heated, exchanges that occur inevitably during the mediation process.

Second, the Court noted that the vitality and success of the mediation process must depend upon "a minimum of Court involvement and interference." *Id.*

The District Court out of which WWOR's petition for a writ of certiorari evolves has taken the requirements of confidentiality and secrecy so far as to actually levy sanctions against an attorney whom the court found to have deliberately violated both the confidentiality provisions governing the Court's mediation program as well as the court's own order referring the matter to confidential mediation. *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995).

In *Bernard*, the parties had participated in a court mediation program governed by a confidentiality provision virtually

identical to that involved in the *Willis* case.[2] Thereafter, the plaintiff's lead counsel revealed to the Court some particulars of settlement offers which had been exchanged during the mediation process, including specific dollar amounts, the full name of the mediator, and non-substantive statements purportedly made by the mediator during the mediation process.

In defense of his disclosures to the court, plaintiff's counsel argued that he was compelled to make the disclosures in order to "set the record straight" following purported opposing party misrepresentations relating to the progress of the parties' mediation efforts to date. Plaintiff's counsel argued that defendants' attestations of their good faith efforts to resolve the matter constituted an "outrageous attempt to mislead the Court," and that the defendants' misrepresentations to the Court regarding the parties' respective settlement positions effectively waived any and all confidentiality rights they may once have enjoyed in mediation.

In evaluating the issues before him, District Court Judge Chin determined that despite plaintiff counsel's articulated defense of needing to "set the record straight," he nevertheless

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2. The relevant provision of the District Court's mediation plan provided:

> Discussions at the mediation conference, including any statement made by any party, attorney or other participants, should be confidential and not reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission. No party should be bound by anything done or said at mediation conferences unless a settlement has been reached.

Guide to the Civil Justice Expense and Delay Reduction Plan, United States District Court, Southern District of New York, ¶ 5, § V.

had violated the Court's order regarding confidentiality, as well as the confidentiality provisions applicable to cases referred to the court mediation program. With respect to defendants' request for sanctions, Judge Chin noted the absence of any case law on the issue of the appropriate measure of punishment for those violating the confidentiality provisions applicable to the court mediation program. Judge Chin further noted that when asked, the court mediation office had informed him that the confidentiality provisions at issue had never been intentionally breached — although they had been inadvertently breached — and that there was indeed no such precedent. The only precedent which appeared to have any applicability, and upon which Judge Chin understandably relied, was the Second Circuit's opinion in the case of *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980). In that case, Judge Chin noted, the court discussed the importance of confidentiality provisions in another alternative dispute resolution context, *i.e.*, pre-argument conferences held pursuant to the Second Circuit's Civil Appeals Management Plan for governing the resolution of cases on appeal. In that case, Judge Chin noted, the Second Circuit noted the importance of confidentiality as follows:

> It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion . . . If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution

> of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program.

608 F.2d 928, 930.

In holding that these same considerations articulated by the Second Circuit in the pre-argument conference setting applied, with equal force, to the district court's mediation program, Judge Chin concluded that plaintiff counsel's conduct was willful, that he acted in a way so as to undermine the mediation process, and that his violation was sufficiently serious and egregious to warrant sanctions in the amount of $2,500.[3]

Thus, at least one court within the Court of Appeal's own Circuit has held that in the course of mediation under its own auspices, individuals disclosing information arising out of the mediation process, be it actual settlement numbers, mediator identity, or positions taken by one or more of the parties, are subject to disciplinary measures, up to and including significant sanctions.

The New York state courts similarly have recognized the sanctity attaching to parties' mediation efforts. In *Lynbrook Glass & Architectural Metals, Corp. v. Elite Associates, Inc., et al.*, 238 A.D.2d 319, 656 N.Y.S.2d 291 (2d Dep't 1997), the Court upheld the New York Supreme Court's denial of a motion brought by Otis Elevator, third-party defendant, to compel the County of Nassau to disclose a certain report prepared in connection with a mediation agreement. The Court noted that

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3. *See also Clark v. Stapleton Corp.*, 957 F.2d 745 (10th Cir. 1992) (Citing the Second Circuit's opinion in *Lake Utopia Paper, supra*, in its admonishment of the plaintiff-appellant there for disclosing remarks to the Court made by opposing counsel at an appellate settlement conference, and warning that future violations of the rule may subject offending counsel to sanctions.)

the parties to the mediation had explicitly agreed that the report at issue as well as other similar reports prepared expressly for the mediation, were to be kept confidential. Therefore, the court maintained, the report had been properly held to be protected from all disclosures.

The New York Legislature also has declared the importance of confidentiality to mediation efforts, as evidenced in its codification of such through several key statutes. For example, the New York Family Court Law provides, in pertinent part, that "[a]ll statements made in proceedings under this article are confidential and shall not be admissible in evidence in any subsequent proceeding or action." New York Family Court Act, § 915. The New York Education Law's section on the Mediation of Civil Rights, Unfair Educational Practices, provides that a person claiming to be aggrieved by an alleged unfair educational practice may file a petition with the Commissioner of Education setting forth the facts in support of his complaint. The Commissioner, upon a finding of probable cause, may attempt to mediate the matter, and in so doing, is faced with the following restraints:

> (c) The commissioner shall not disclose what takes place during such informal efforts at persuasion, conciliation or mediation nor shall he offer in evidence in any proceeding the facts adduced in such informal efforts.

New York Education Law, § 313(5)(c).

Further, the Association, the very entity through which the instant Grievance proceeded to Arbitration, in the Employment Mediation Rules of its National Rules for the Resolution of Employment Disputes, specifically provides for the confidentiality of information disclosed during the mediation process, as follows: "[a]ll records, reports, or other documents received by a mediator while serving in that capacity shall be

confidential." The quoted section further provides that the mediator "shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum." National Rules for the Resolution of Employment Disputes, Employment Mediation Rules, ¶ 12, American Arbitration Association (June 1, 1997).

Similarly, the Federal Mediation and Conciliation Service, in furtherance of public policy as well as its mission to preserve the impartiality and integrity of its commissioners and employees, has promulgated strict prohibitions on the disclosure of material and information arising during the mediation process under its auspices. The relevant provisions of the regulations of the Federal Mediation and Conciliation Service are as follows:

> (b) No officer, employee, or other person officially connected in any capacity with the Service, currently or formerly shall, in response to a subpoena, subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the Service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.

29 C.F.R. § 1401.2(b).

The foregoing demonstrates a uniform policy amongst judicial processes to protect the confidences born of mediation, without equivocation. The opinions below are in error, depriving WWOR of its benefit of the mediation bargain, by

placing a definitive emphasis upon the source of the information ultimately breached. The approach adopted by the Court of Appeals places a dent in the armor of confidentiality, inviting unnecessary litigation over the precise nature or source of an acknowledged mediation disclosure, to the exclusion of a more predictable and reliable *per se* prohibition against any mediation breach. WWOR's petition for a writ of certiorari should be granted in order that this Court, through the exercise of its supervisory authority over judicial proceedings, may define that mediation disclosures are to be condemned, *per se*.

CONCLUSION

This case presents a question of exceptional importance in a dawning era of alternative dispute resolution — whether a participant in mediation can remain absolutely confident that it will suffer no prejudice upon submitting to mediation's unceremonious dynamics. If the opinion below is allowed to stand, not only will WWOR have been unfairly denied the security of the mediation process so in need of safeguarding by the courts, but the integrity of all institutions of alternative dispute resolution, and the trust of their myriad confidants, also will be dealt an unwitting, injurious blow. However, by granting WWOR's petition for a writ of certiorari, this Court can correct the Court of Appeal's misplaced focus and resuscitate ironclad confidentiality as the mainstay of mediation. Consequently, this Court can restore not merely WWOR's investment in mediation, but the full faith and credit that the flourishing enterprise of alternative dispute resolution portends, and richly deserves. Thus, the facts of this case afford this Court the unique opportunity to place an unequivocal imprimatur upon the uncompromising integrity of mediation, the linchpin of alternative dispute resolution, and reaffirm the important role played by the entire realm of alternative dispute resolution throughout litigation, let alone society.

Accordingly, WWOR respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

DON T. CARMODY
Counsel of Record
DON T. CARMODY, ESQ., P.C.
Attorney for Petitioner
P.O. Box 837
16 Lower Byrdcliffe Road
Woodstock, New York 12498
(914) 679-4500

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 1, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of December, one thousand nine hundred ninety-eight.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,
Circuit Judges.

#98-7593

WWOR-TV, INC.,

Plaintiff-Appellant,

v.

LOCAL 209, NABET-CWA, AFL-CIO,

Defendant-Appellee.

ORDER

* * *

Appendix A

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (John G. Koeltl, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

WWOR-TV, Inc. ("WWOR") laid off a number of employees who were members of Local 209, NABET-CWA, AFL-CIO (the "Union"). **Blue 7**. WWOR then reemployed the laid-off workers to do substantially the same work as they had done before but on less favorable terms. **A-233, A-248**. The Union believed that WWOR's actions violated the collective bargaining agreement between the parties and demanded arbitration. **Blue 8**. The arbitrator entered an award for the Union. **A-448-49**. WWOR petitioned the United States District Court for the Southern District of New York (Koeltl, *J.*) to vacate the award, and the Union cross-petitioned to have the award confirmed. **Blue 2-3.** The district court denied WWOR's motion and granted the Union's. **A-457-58.** WWOR appeals, arguing that there was no evidence before the arbitrator on which she could have found for the Union. **Blue 21-30.** WWOR further argues that the arbitrator based her award in part on information she learned in her capacity as mediator rather than arbitrator and that in so doing she violated an agreement whereby the parties were guaranteed that they would not be prejudiced by participating in mediation. **Blue 43.** We affirm.

BACKGROUND

On April 23 and May 7, 1993, WWOR laid off nine employees who were members of the Union. **A-233; A-448; Red 4; Blue 7-8**. Despite being laid off, the employees were

told to report for work the next day. They continued to perform substantially the same duties as they had in the past but in the nominal capacity of temporary rather than permanent employees. **A-233; A-448.** On May 10, 1993, the Union brought a grievance alleging that WWOR's actions violated its collective bargaining agreement with the Union. **A-446.** On May 24, 1993, pursuant to the applicable provision of the agreement, the Union demanded arbitration. **A-446; A-219; Blue 8.**

An arbitrator was named, and an initial arbitration hearing was held on December 23, 1993. **A-446**. In a subsequent session, held on June 8, 1994, the parties invited the arbitrator to attempt mediation. **A-447; Blue 9**. Counsel for WWOR said that he expected that "the conduct of mediation on the part of the arbitrator would in no way prejudice either [WWOR] or [the Union] in our presentation of the case or our defense of the case." **A-140.** The Union and the arbitrator both agreed to this proposition. **A-140.** Mediation was not successful. On January 25, 1995, the Union announced that it was abandoning its efforts to settle the dispute through mediation. The arbitrator then recommended arbitration, **A-209-10; A-254,** and the Union immediately rested its case. **A-209-10; A-254.** At that time, a copy of the grievance, a copy of the demand for arbitration, and a copy of the contract between the parties had been entered into the record of the arbitration. **A-447**.

On October 14, 1995, the arbitrator issued an interim opinion stating that the Union had established a *prima facie* case. **Blue 13; A-448.** Despite having been thus informed that the Union had met its initial burden, WWOR rested its case on May 28, 1996, without introducing any further testimony or documentary evidence. **Blue 13; A-448.** On September 12,

1996, the arbitrator issued a written opinion sustaining the Union's grievance. **Blue 13; A-448-49**. She also announced that a hearing would be held on December 30, 1996, for the purpose of determining the remedy to which the Union was entitled. **A-449; Blue 13.** WWOR announced that it would not attend, and in fact did not attend, the remedy hearing. **A-449; Blue 14.** The Union did attend the remedy hearing, and the arbitrator proceeded to calculate the award. Her calculations were based in part upon answers that the laid-off employees had given to questions in a questionnaire that the parties had developed jointly during their efforts at mediation. **A-450; A-159**. The questionnaire asked the employees when they had been laid off, whether and when they had been rehired, what other earnings they had, what benefits they had been entitled to, and other similar questions. **A-386-400.**

On May 19, 1997, WWOR filed an amended petition in the United States District Court for the Southern District of New York seeking vacation of the arbitral award on the grounds that the arbitrator had exceeded her authority and conducted irregular proceedings. **Blue 2**. WWOR alleged (1) that the record of the arbitration had contained no testimony or documentation supporting the Union's claims and (2) that the arbitrator had based her awards on information she learned as mediator, despite the fact that WWOR had been assured that the mediation would not prejudice its case. **Blue 2-3.** On May 27, 1997, the Union cross-petitioned to confirm the results of the arbitration. **Blue 3**. Each side moved for summary judgment. **Blue 3**. In an oral ruling on March 12, 1998, the district court denied WWOR's motion for summary judgment and granted the Union's, thus confirming the arbitration. **A-456**. One week later, on March 19, the district court issued a written order confirming its oral ruling for the Union. **A-457-58.**

WWOR now appeals.

Appendix A

DISCUSSION

A) Standard of Review

"The showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted) (***TJM*, ALK, no 3d judge**). Unless the party opposing confirmation can show a statutory basis for vacating, modifying, or correcting the award, the award must be confirmed. *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 707 (2d Cir. 1985) (**JLO, TJM, *LWP***). And in cases arising under collective bargaining agreements, bases for impugning an award are not liberally recognized. "As long as the arbitrator's award draws its essence from the collective bargaining agreement, and is not merely [her] own brand of industrial justice, the award is legitimate." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (internal quotation marks and citation omitted). This court has thus held that an arbitrator "need only explicate [her] reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny." *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (internal quotation marks and citation omitted) (**RKW, *RJM*, FSBillings**).

B) Merits

1) *Basis in the Record.* WWOR acknowledges that a copy of the Union's grievance and a copy of the collective bargaining agreement were in the record of the arbitration when the Union rested its case. (**Blue 11**) The grievance alleged that WWOR

was in violation of § 12.04 of the agreement. **A-221, A-223.** In her interim opinion of October 14, 1995, the arbitrator recited § 12.04, analyzed each party's argument as to the meaning and applicability of its terms, applied the provisions of that section to the facts of the dispute before her, and concluded that the Union had made a *prima facie* case that WWOR's actions violated § 12.04. **A-223-234.** There is no indication that the arbitrator's analysis and application of the collective bargaining agreement was anything other than competent and conscientious. It is clear that the arbitrator's award drew "its essence from the collective bargaining agreement," *United Paperworkers*, 484 U.S. at 36, and that the explanation that the arbitrator offered of her "reasoning under the contract" was a more than "colorable" justification of the result she reached, *Marine Pollution Serv.*, 857 F.2d at 94.

WWOR objects, however, that the *facts* to which the arbitrator applied the collective bargaining agreement were not properly before the arbitrator. (**Blue 6, 19; Reply 8**) It argues either that there was no evidence in the record as to the matter to be arbitrated, because no such testimony had been introduced, (**Blue 10-11,**) or that the arbitrator treated the oral representations of counsel for the Union as evidence and did not accord similar status to the representations of counsel for WWOR (**Blue 19**). We disagree.

The first version of WWOR's argument can be reduced to the claim that the arbitrator had no legitimate way of knowing the basic facts in dispute. But by the time that the arbitrator issued her interim opinion, this matter had been in arbitration for more than two years, and the arbitrator had conducted multiple sessions with the two parties. Counsel for each side had discussed the facts of the case in the arbitrator's presence

and had responded to her questions. The argument that she could not have known the basic facts is thus not sustainable. And as to the second version of WWOR's argument, there is no reason to think that the arbitrator did not listen to counsel for both sides and form her understanding of the case through a discriminating attention to their various statements. WWOR asserts that the arbitrator formed her opinion based on knowledge she gained as mediator rather than arbitrator. **Blue 31**. But the information gleaned from counsel during the arbitration itself was sufficient to support the arbitrator's decision.

We know of no reason, and WWOR does not urge any, why an arbitrator may not form her impression of basically undisputed facts (**A-452**) from the statements of counsel for both sides. *See Bates v. Long Island R.R. Co.*, 997 F2d 1028, 1035 (2d Cir. 1993) ("[T]he fact-finding process in arbitration generally is not equivalent to judicial fact-finding. Because arbitration is designed to resolve labor disputes inexpensively and efficiently, the parties to arbitration generally do not conduct extensive discovery and do not use the Federal Rules of Evidence."); *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 39 (2d Cir. 1988) (Federal Rules of Evidence and of Civil Procedure do not apply in arbitration proceedings). And on the specific facts of this case, we cannot see how the arbitrator's fact-finding worked any unfairness toward WWOR. This is especially so in light of WWOR's refusal to introduce testimony or evidence of its own after the arbitrator informed WWOR that the Union had established a *prima facie* case. If WWOR had facts that it wished to place before the arbitrator, it quite clearly could have done so.

2) *Mediation*. The parties agreed that participation in mediation would not prejudice either side in its presentation or

defense of the case. **A-140.** According to WWOR, the arbitrator violated this agreement by receiving into evidence questionnaires that had been prepared for use in mediation. (**Blue 15-16**.) It is true that the questionnaires that the arbitrator used to calculate the damage award were jointly developed during mediation. **A-159.** But WWOR fails to show that the use of that evidence was *prejudicial*. We believe that it was not.

The point of a guarantee that participating in mediation will not prejudice one's case is to prevent information that one discloses (or positions that one takes) in a cooperative spirit from being used to one's disadvantage at a later, less cooperative time. *Cf.* Fed. R. Evid. 408. That concern has no application to the facts before us. None of the information that was used in calculating the award came from WWOR. It all came from the laid-off employees, members of the Union, who filled out the questionnaires. WWOR's participation was in no way necessary to the Union's gathering of this information from its own members.

Had the parties not developed the questionnaire jointly during mediation, the same information still would have been required during the remedy phase, and the Union would have collected it without WWOR's participation. If the Union had written a damage questionnaire all by itself, WWOR would have no grounds to complain. We therefore conclude that WWOR was not prejudiced by its participation in mediation efforts.

The Union asks that it be awarded costs and attorney's fees incurred in this appeal. **Red 22.** Costs on appeal are granted; attorney's fees are not.

Appendix A

The decision of the district court is affirmed.

FOR THE COURT:

s/ Ralph A. Anderson
Acting Operations Manager

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 19, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 9494 (JGK)

In the Matter of the Arbitration Between

WWOR-TV, INC.,

Petitioner,

– AGAINST –

LOCAL 209, NABET-CWA, AFL-CIO, and NAT'L ASSOC. OF BROADCAST EMPLOYEES AND TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

ORDER

* * *

JOHN G. KOELTL, District Judge:

The Court, having heard oral argument in this matter on March 12, 1998 and for the reasons explained on the record, hereby denies the petitioner's motion for summary judgment

and grants the respondent's cross-motion for summary judgment. The Clerk of the Court is hereby directed to enter judgment for the respondents confirming the arbitration awards and closing this case.

SO ORDERED.

Dated: New York, New York
March 19, 1998

s/ John G. Koeltl
John G. Koeltl
United States District Judge

APPENDIX C — EXCERPTS OF ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 12, 1998

[Commencing at page 23]

THE COURT: All right. I'm prepared to rule.

This is a motion for summary judgment by the petitioner, WWOR-TV, Inc. ("WWOR"), to vacate an arbitration award in favor of the respondents, Local 209, NABET-CWA, AFL-CIO ("Local 209") and the National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers Of America, AFL-CIO ("NABET-CWA") (collectively, the "Union"). WWOR alleges that the arbitration award should be vacated because the Arbitrator exceeded her authority in upholding the Union's grievance and fashioning a remedy. The respondents oppose the motion and filed a cross-motion for summary judgment to confirm the award in their favor. For the reasons that follow, the petitioner's motion is denied, and the respondents' motion is granted.

The standard for granting summary judgment is well-established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Gallo v. Prudential Residential Servs. Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994); *Corsini v. Ross*, No. 97 Civ. 0968, 1997 WL 539950, *2, (S.D.N.Y. Aug. 28th, 1997). "The trial court's task at the summary judgment motion stage of litigation is carefully limited to discerning whether

there are genuine issues of material fact, to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." *Gallo* 22 F.3d at 1224; *see Corsini*, 1997 WL 539950 at *2.

The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex* 477 U.S. at 323. The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit, under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Gallo*, 22 F.3d at 1223; *Corsini*, 1997 WL 539950 at *2.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a general issue for trial." Fed. R. Civ. 56(e). With respect to the issues on which summary judgment is sought, if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994); *Corsini*, 1997 WL 539950 at *3.

If the moving party has met its burden, the opposing party "must do more than simply show that some metaphysical doubt

as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party must set forth specifying facts showing that there is a genuine issue for trial. The nonmoving party may not rest upon mere allegations or denials of the moving parties' pleadings. *See Anderson*, 477 U.S. at 248-249; *Askir*, 1997 WL 595587 at *2. Speculative and conclusory allegations are, insufficient to meet this burden. *See Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995); *Meiri v. Dacon*, 759 P.2d 989, 998 (2nd Cir.), *cert. denied*, 474 U.S. 829 (1985).

Where, as in this case, both parties seek summary judgment, the Court must " 'evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.' " *Abrams v. United States*, 797 P.2d 100, 103 (2d Cir. 1986) (quoting *Schwabenbauer v. Board of Educ.*, 667 F.2d 305, 314 (2d Cir. 1981); *see Corsini*, 1997 WL 539950 at *3. Only where one of the parties is entitled to judgment as a matter of law upon material facts not genuinely in dispute is the Court warranted in granting summary judgment. *See Corsini*, 1997 WL 539950 at *3.

The petitioner and the respondents were both involved in the negotiation and administratjon of a collective bargaining agreement (the "contract") signed by WWOR and the responded NABET-CWA. (Pet'r 3(G) Stmt. paragraphs 2, 4; Resp. 3(G) Stmt. paragraph 1.) The respondent Local 209 is a member labor organization of the NABET-CWA. (Pet'r 3(G) statement paragraph 3; Resp. 3(G) Stmt. paragraph 1.) The respondents filed a grievance in this matter on May 20, 1993, alleging that the petitioner violated Section 12.04 of the contract by failing to reinstate employees, in the inverse order of layoff, to the job grouping from which they were previously laid off. (Pet'r 3(G)

Stmt. paragraph 12; Resp. 3(G) Stmt. paragraph 1.) The petitioner denied the grievance, and the respondents filed a demand for arbitration. (Pet'r 3(G) Stmt. paragraphs 13, 14; Resp. 3(G) Stmt. paragraph 1.)

After an initial arbitration hearing was held on December 23, 1993, and Arbitrator Joan Parker adjourned the matter to June 8, 1994, the petitioner submitted to the Arbitrator a motion to dismiss and, in the alternative, a motion *in limine*. (Pet'r 3(G) Stmt. paragraphs 15-18; Resp. 3(G) Stmt. paragraph 1.) The motion to dismiss alleged that the respondents' grievance was not arbitrable because the issues raised in that grievance were resolved in a proceeding before another arbitrator. (Resp. 3(G) stmt. Ex.A.) Arbitrator Parker denied the petitioner's motion to dismiss and made no ruling at that time on the motion *in limine*. (Pet'r 3(G) Stmt. paragraph 19; Resp. 3(G) Stmt. paragraph 1.) Thereafter, the parties spent a great deal of time attempting to reach agreement on the issues to be arbitrated. (Land Aff. Exs. C and D.) When this attempt proved unsuccessful, the parties invited Arbitrator Parker to mediate their dispute. (Pet'r 3(G) Stmt. paragraph 20; Resp. 3(G) Stmt. paragraph 1.) The parties agreed that neither side would be prejudiced in any manner by participating in the mediation efforts. (Pet'r 3(G) Stmt. paragraph 21; Resp. 3(G) Stmt. paragraph 1.)

When the arbitration hearing resumed on January 25, 1995, after several unsuccessful mediation sessions, the Union rested its case-in-chief without presenting any testimonial evidence. The only documents in the record prior to the Union's resting were three Joint Exhibits: (1) a copy of the Grievance; (2) a copy of the demand for arbitration; and (3) a copy of the contract. (Pet'r 3(G) Stmt. paragraph 28-30; Resp. 3(G) Stmt.

paragraph 7.) The petitioner filed a second motion to dismiss on the ground that the respondents had failed to state a *prima facie* case of any 12.04 violation. (Pet'r 3(G) Stmt. paragraph 32-35; Resp. 3(G) Stmt. paragraph 8-9, Ex.B.)

Arbitrator Parker denied WWOR's motion in an interim Opinion issued on October 14, 1995 (Am. Pet. Ex. 3.) The Arbitrator explained:

> The parties agree that on April 23 and May 7, 1993 nine employees at WWOR-TV were laid off and were instructed to report to work the next working day. The Company did not reinstate these employees under Section 12.04, but had them return to work as temporary employees .... The fact that the very same employees who were laid off were hired the next day to perform their former job functions within the same job grouping from which they were laid off establishes a *prima facie* case. The Company treated these employees as temporary employees rather than regular employees. Therefore, it is now the Company's burden to prove why these employees were treated as temporary employees. ...

(*Id.* at 12-23.) When the arbitration hearing resumed on May 28, 1996, WWOR rested its case without calling any witnesses or introducing any evidence. (Pet'r 3(G) Stmt. paragraph 37-38; Resp. 3(G) Stmt. paragraph 12.) Arbitrator Parker orally advised the parties that, in light of her previous finding that the Union had presented a *prima facie* case and based on WWOR's failure to respond with testimony or evidence on the merits, she would issue an award in the Union's favor. (Pet'r 3 (G) Stmt. paragraph 38; Resp. 3(G) Stmt. paragraph 12.) In a written Opinion and

Appendix C

Award dated September 12, 1996, Arbitrator Parker sustained the Union's grievance but did not render a remedy decision. (Am. Pet. Ex. 4.)

Arbitrator Parker scheduled a remedial hearing for December 30, 1996 and afforded the parties an opportunity to present testimony, evidence, and argument regarding to what relief, if any, the grievants were entitled. (Pet'r 3(G) Stmt. paragraph 40; Resp. 3(G) Stmt. paragraph 13.) The petitioner, having already initiated this action to vacate the September 12 award, advised the American Arbitration Association ("AAA") that it would not participate in the remedial hearing and requested injunctive relief with respect to the issuance of any arbitrable remedy. (Pet'r 3(G) Stmt. paragraph 41, Resp. 3(G) Stmt. paragraph 15.) Despite notification from the AAA that the remedial hearing would proceed as scheduled, WWOR chose not to attend that hearing. (Pet'r 3(G) Stmt. paragraph 42, Resp. 3(G) Stmt. paragraph 15; Am. Pet. Ex. 6.)

Accordingly, the Union's claims and supporting documentation with respect to the relief it sought were left unrebutted in the record before Arbitrator Parker. (Resp, 3(G) Stmt. paragraphs 16-17.) In a written Opinion and Award dated February 13, 1997, the Arbitrator computed each grievant's entitlement with respect to health insurance premiums, lost pension contributions, lost vacations, and lost holidays. (Am. Pet. Ex. 6.) Arbitrator Parker's remedy calculations were based in part on the individual grievant's responses to a questionnaire jointly developed by the parties' counsel during the mediation efforts which were submitted by the respondents in the course of the remedial hearing. (Pet'r 3(G) Stmt. paragraphs 24-25, 44; Resp. 3(G) Stmt. paragraph 17.)

Appendix C

Limited review of arbitration decisions is necessary to effectuate the parties' agreement to submit their disputes to arbitration and to avoid costly and protracted litigation about issues the Arbitrators have already decided. *See, e.g., United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.* 484 U.S. 29 (1987); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S: 593 (1960); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993); *Smithkline Beecham Biologicals, S.A. v. Biogen, Inc.*, 95 Civ 4988, 1996 WL 209897, *3 (S.D.N.Y. Apr. 29, 1996). For these reasons, a party challenging an arbitration award bears a heavy burden of proof. *See Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (the "showing required to avoid summary confirmation of an arbitration award is high."); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Smithkline*, 1996 WL 209897 at *3.

In defining this heavy evidentiary burden, the Supreme Court has held that "[a]s long as the Arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely '[her] own brand of industrial justice,' the award is legitimate." *Misco*, 484 U.S. at 15, (quoting *Steelworkers*, 363 U.S. at 596). Accordingly, an Arbitrator's award is entitled to substantial deference in determining whether the Arbitrator's award draws its essence from the collective bargaining agreement. *See, e.g., Burns Int'l Security Serv. v. United Plant Guard Workers of Amer. and its Local 537*, 47 F.3d 14, 37 (2d Cir. 1995). Thus, an arbitrator "need only explicate [her] reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny." *In re Marine Pollution Service, Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (internal citation and quotation marks omitted); *see Willemijn*, 103 F.3d at 13;

Appendix C

Consolidated Edison of Mew York, Inc. v. Utility Workers' Union of Amer., AFL-CIO, Local 1-2, No. 95 Civ. 1672, 1996 WL 374143, *2 (S.D.N.Y. Jul. 3, 1996).

The Supreme Court has further held that district courts "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of facts or on misinterpretation of the contract." *Misco*, 484 U.S. at 36; *see ConnTech Development Co. v. University of Connecticut Educ. Properties, Inc.*, 102 F.3d 677, 686 (2d Cir. 1996); *Folkways*, 989 F.2d at 111. Rather, the courts should consider whether an arbitrator exceeded her authority in rendering an award. Thus, even if convinced that an arbitrator committed serious error, district courts cannot overturn an arbitrator's decision "as long as the Arbitratorwas] even arguably construing or applying the contract and acting within the scope of [her] authority" when she made the award. *Misco*, 484 U.S. at, 38.

The petitioner argues that Arbitrator Parker exceeded her authority in confirming the respondents' grievance because there was insufficient factual support in the record on which to base her award. However, it is plain that the record before Arbitrator Parker provided more than a sufficient basis to render a decision in this matter. The parties do not dispute that the petitioner laid off certain employees during the spring of 1993. (Pet'r 3(G) Stmt. paragraph 11; Resp. 3(G) Stmt. paragraph 3; Land Aff. Ex. C. — Tr. 12/23/93 at 43.) The parties also do not dispute that the petitioner soon thereafter reemployed those persons On a daily or weekly basis following the layoff. (Land Aff. Ex. C. — Tr. 12/23/93 at 50-51.) Moreover, the December 23, 1993 and June 8, 1994 arbitration hearing transcripts reveal lengthy on-the-record discussions between the parties' counsel

and Arbitrator Parker as to what issue was before her and what facts were disputed. (Land Aff. Exs. C, D.)

Moreover, the Arbitrator also had before her two extensively briefed motions to dismiss. Accordingly, these discussions and accepted facts led Arbitrator Parker to conclude that the issue before her involved the interpretation of a provision of the contract under certain circumstances.

In her interim Opinion denying the petitioner's second motion to dismiss, Arbitrator Parker explained to the parties:

> To make it clear, this grievance concerns an alleged subterfuge. It is the Union's position that the Company created vacancies by laying off employees pursuant to Section 12.03 and then rehiring them the very next day to perform the very same functions in the same job groupings from which they were laid off, but without contractual benefits. . . .
>
> It is the Arbitrator's conclusion that . . . The Union has established a *prima facie* case. . . . The Company treated these employees as temporary employees rather than regular reinstated employees. *Therefore, it is now the Company's burden to prove why they [sic], employees were treated as temporary employees; that is, to demonstrate that the openings which they filled were not vacancies within the meaning of Section 12.04 and that the nature and duration of their assignments, in fact, were temporary and therefore not subject to the provisions of Section 12.04.*

(Am. Pet. Ex. 3 at 12-13) (emphasis added). Thus, the contract, the extensive briefing, and the Arbitrator's view as to what was disputed based upon the statement of counsel allowed Arbitrator Parker to interpret the relevant provisions of the contract in light of the undisputed facts. It cannot be said that the award did not draw its essence from the contract or that it was utterly lacking in any colorable support. Indeed, the Arbitrator's award draws its essence from her interpretation of Section 12.04 in light of the undisputed facts.

Further, the petitioner was on notice that Arbitrator Parker was prepared to find that the Union had established a *prima facie* violation of Section 12.04 if the Union's *prima facie* case were not rebutted. WWOR was on notice that it risked an adverse award if it did not proceed. For example, after issuing her Interim Opinion and prior to issuing her Opinion and Award, Arbitrator Parker explained to the parties that:

> The opinion will state only that inasmuch the union was found in a prior decision by the Arbitrator to have put forward a *prima facie* case and in light of the fact that the company chose not to respond with evidence or testimony of its own to that case, the Arbitrator has no choice but to sustain the grievance. *This is not my doing, this is your doing. . . .*
>
> I particularly gave a roadmap here for what everyone had to do to complete this case. *If you had been willing, able and ready to proceed, there is no reason to think that the Arbitrator would not have paid very close attention to your proofs.*

(May 20, 1996 Tr. at 13-15, Ex. D to Resp. 3(G) Stmt.) (emphasis added). WWOR chose not to introduce such evidence and instead proceeded with this action where it again argues that the Union failed to establish a *prima facie* case.

Accordingly, based on the record and extensive submissions before the Arbitrator, it cannot be said that the award did not draw its essence from the contract or lacked any colorable justification. Moreover, given the extensive briefing occasioned by the petitioner's own motions to dismiss, the Arbitrator's procedural handling of the case was a reasonable way to proceed. Finally, the petitioner, having decided not to present any rebuttal evidence and fully aware of the consequences of such a decision, cannot now seek to vacate the award based an the alleged insufficiency of the evidence when any such insufficiency was the result of WWOR's own legal strategy. Thus, the opinion and Award issued by Arbitrator Parker on September 29, 1996 should be confirmed.

The petitioner also argues that the Arbitrator based the remedy award on documents that were improperly used as the basis for that award. For example, WWOR alleges that the answers to questionnaires that were prepared by the grievants to facilitate mediation should not have been admissible as evidence in light of the agreement that no party would be prejudiced by participating in the mediation efforts. However, the information on which the Arbitrator relied came from the grievants themselves, and the Union would have had access to the grievants to present the very same information to the Arbitrator at the remedy hearing. Accordingly, it cannot be said that the award lacked colorable support. *See Willemijn*, 203 F.3d at 12-23 (if ground for the Arbitrator's decision can be inferred from the facts of the case, that decision must be confirmed even if it was based on an error of law.)

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Further, the petitioner made the decision not to attend the remedial hearing and should not now be allowed to complain about alleged errors in the admission of evidence. The petitioner waived its right to raise such complaints by opting not to participate in the remedial hearing despite adequate notice of the reason and purpose for that hearing. Thus, the Opinion and Award issued by Arbitrator Parker on February 13, 1997 should be confirmed.

For the reasons explained above, the petitioner's motion for summary judgment is denied and the respondents' cross-motion for summary judgment is granted. The Clerk of the Court is hereby directed to enter judgment for the respondents confirming the arbitration awards and closing this case.

So ordered.

MR. LEWIS: Thank you, your Honor.

MR. CARMODY: Thank you.

(Record closed)

APPENDIX D — OPINION AND AWARD OF THE AMERICAN ARBITRATION ASSOCIATION DATED FEBRUARY 13, 1997

AMERICAN ARBITRATION ASSOCIATION
CASE NO. 13 300 00817 93

In the Matter of the Arbitration

Between

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS

and

WWOR - TV

Opinion & Award

Re: Remedy in Grievance No. 93-8-TV

Before: Joan Parker
Arbitrator

* * *

On September 12, 1996, the undersigned issued an Award in the instant matter. That Award stated as follows:

> BASED UPON THE ARBITRATOR'S INTERIM AWARD DATED OCTOBER 14, 1995, IN WHICH SHE FOUND THAT THE UNION HAD ESTABLISHED A *PRIMA FACIE* CASE, AND IN

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LIGHT OF THE COMPANY'S FAILURE TO RESPOND TO THAT CASE WITH ANY TESTIMONY OR EVIDENCE ON THE MERITS, THE GRIEVANCE IS HEREBY SUSTAINED. PURSUANT TO A SUGGESTION BY THE COMPANY, WHICH WAS ACCEPTED BY THE UNION, THE ARBITRATOR WILL NOT RENDER A DECISION AS TO REMEDY AT THIS TIME. RATHER, A SEPARATE HEARING WILL BE SCHEDULED IN ORDER TO AFFORD THE PARTIES OPPORTUNITY TO PRESENT TESTIMONY, EVIDENCE, AND ARGUMENT AS TO THE RELIEF, IF ANY, THAT IS DUE THE AFFECTED GRIEVANTS.

Thereafter, on October 25, 1996, the American Arbitration Association notified the Company and Union that a hearing would be held on December 30, 1996. Consistent with the arbitration Award quoted above, the purpose of the hearing was to afford the parties opportunity to present testimony, evidence, and argument regarding the relief, if any, to which the affected grievants were entitled.[1]

By letter dated December 23, 1996, the Company's counsel notified the American Arbitration Association that WWOR-TV had initiated an action in the United States District Court for

1. The Arbitrator had not granted any remedy in her Award of September 12, 1996 because the parties had previously agreed, pursuant to a suggestion by the Company's counsel in correspondence dated October 13, 1995, that the hearing be bifurcated. Specifically, the Company proposed, and the Union agreed, that if the grievance were sustained by the Arbitrator, a separate hearing be held in order for the parties to present testimony, evidence, and argument with respect to the nature and amount of any relief that might be due the grievants.

the Southern District of New York to vacate the Award of September 12, 1996. The Company further advised the American Arbitration Association that in light of its filing of this suit, it would decline to participate in the remedial hearing scheduled for December 30, 1996.

The Company requested that the American Arbitration Association apprise the undersigned of its action to vacate her Award, including its request for injunctive relief, if necessary, relative to the issuance of any arbitral remedy.

By letter dated December 24, 1996, the American Arbitration Association replied to the Company as follows:

* * *

> Absent a Court Order to stay the arbitration of the above captioned matter, the Association will proceed with further administration of the case.
>
> Pursuant to Section 27 of the Labor Arbitration Rules (p. 27), "Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice fails to be present or fails to obtain a postponement." As a reminder, the hearing has been set by direction of the Arbitrator.

* * *

In the late afternoon of Friday, December 27, 1996, the American Arbitration Association's case administrator, Robert Layliev, contacted the Arbitrator and advised that he had just

received a telephone call from Don Carmody, the Company's counsel. In that call, Mr. Carmody advised that neither he nor the Company would appear at the scheduled hearing on December 30, 1996, but that he intended to retain a reporter to make a stenographic transcript of the proceeding. Mr. Layliev reported that following this telephone call, he had unsuccessfully attempted to reach the Union's counsel.

The Arbitrator informed Mr. Layliev that she still intended to go forward with the hearing scheduled for December 30, 1996. This was especially true inasmuch as the Company as of that date had not requested the Arbitrator to grant a postponement. In fact, at no time prior to or on December 30, 1996 did the Company request that the hearing be postponed pending the outcome of its motion to vacate the September 12th Award.

On December 30, 1996, the Arbitrator appeared for the scheduled hearing, as did the Union. The Company did not appear although the stenographer it retained was in attendance. Having not been notified of the Company's intent to make a stenographic record of the hearing, the Union objected to the presence of the reporter. That objection was overruled by the Arbitrator who also declared that the stenographic transcript would be the official record of the proceeding.

Contentions of the Union:

Brian Wood, the President of NABET, Local 209, testified in support of the Union's claims with respect to the relief due the grievants. According to the Union, eight individuals are entitled to a remedy in this matter: Phillip Reinhardt, Liung Hsiung Hu, Richard Korn, Ben Wilder, Bill Baggett, Karen Brillaud, Randy Jackson, and James Taylor. These individuals

were laid off as of May 7, 1993 and thereafter rehired as "temporary" employees. However, they performed their former functions in the same job grouping from which they were laid off, and their jobs remained unchanged except for the fact that they no longer enjoyed fringe benefits. In the Union's view, the eight employees who were improperly converted from permanent to temporary status, and who were denied reinstatement pursuant to Section 12.04 of the Agreement, are entitled to a "make-whole" remedy.[2]

Wood further testified that the Union's calculations as to the amount of money due each grievant was based upon a questionnaire, which was jointly developed by the Union and Company's respective attorneys, and which was distributed to the employees who were laid off in May 1993. Also relied upon were work schedules, other documentation provided by the Company, and personal interviews with those individuals whose responses to the questionnaire were either incomplete or unclear. Based upon these sources, the Union calculated the amount of loss that was suffered by each of the eight grievants named above. The Union's calculations were explained by Brian Wood and were submitted into evidence as Union Exhibit U-4R(A) through U-4R(H).

The Union identified the period of loss for each grievant and calculated the remedy due based upon his/her weekly wages. The Union contends that the lost fringe benefits include:

---

2. The Union emphasized that while more than eight employees were laid off, it makes no claim for damages for those individuals who were properly brought back to work as daily hires or for those who resigned from employment after May 10, 1993. The Company was also fully credited for those temporary employees whom it converted back to regular status at some point after May 10, 1993.

health insurance premiums that the grievants paid on their own but that the Company normally pays for permanent employees; pension contributions; paid vacation; paid holidays; and the "lost opportunity" to have paid sick days and to purchase such items as supplemental life insurance and disability insurance.

Using its data base and including the "lost" fringe benefits identified above, Wood testified that the grievants are due the following amounts of money, plus interest at an appropriate rate:

Phil Reinhardt	:	$ 3,221.28
Liung Hsiung Hu	:	$11,322.60
Richard Korn	:	$ 1,307.00
Ben Wilder	:	$ 4,183.30
Bill Baggett	:	$ 5,919.80
Karen Brillaud	:	$ 1,042.50
Randy Jackson	:	$ 1,648.60
James Taylor	:	$ 8,947.86

Thus, the Union seeks a monetary award of $37,592.94 plus interest.

Opinion:

Inasmuch as the Company neither appeared at the hearing nor submitted evidence with respect to the issue of remedy, the Union's claims and supporting documentation are unrebutted in the Record. They are, therefore, entitled to significant weight. This is especially true inasmuch as the Union's primary source of information was a questionnaire that was jointly developed

by the parties for distribution to the affected employees in order to determine the amount of their losses.[3]

Most of the Union's claims, are reasonable, given the Arbitrator's findings as set forth in her Award of September 12, 1996. An appropriate remedy is to make the eight grievants whole for their lost fringe benefits and to reimburse them for expenditures they made in assuming the costs of their health insurance during the period they worked as temporary employees.

The Arbitrator does not believe, however, that the grievants are due any monetary relief for their "lost opportunities" to enjoy paid sick time and to purchase additional insurance. These lost opportunities do not constitute tangible and calculable monetary losses. There is no way of knowing who would have bought supplemental life insurance and disability insurance. With respect to sick days, there is no evidence in the Record as to whether any of the grievants missed work due to illness while they were temporary employees and whether the absence of paid sick days affected their usage of sick time.

The Arbitrator has also denied the Union's request for an award of interest. The Arbitrator's objective is to make the grievants whole for their tangible financial losses. In this case, given the nature of the losses, it is inappropriate to award interest. Moreover, labor arbitration is a remedial, rather than a punitive process and, for this reason, interest is not normally granted.

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3. This questionnaire was developed by the parties during the mediation process when it was still hoped that an amicable resolution could be negotiated.

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Based upon the foregoing analysis, the Arbitrator has computed each grievant's entitlement with respect to health insurance premiums that were paid under COBRA, lost pension contributions at the 5% level (including 2% matching and 2% profit sharing contributions, lost vacation, and lost holidays where applicable.

She hereby awards that each of the eight grievants is entitled to the following remedy:

AWARD:

1. The Company is directed to pay the following individuals the sums of money specified next to their names:

Phil Reinhardt	:	$ 3,021.28
Liung Hsiung Hu	:	$10,622.60
Richard Korn	:	$ 1,207.00
Ben Wilder	:	$ 3,933.30
Bill Raggett	:	$ 5,569.80
Karen Brillaud	:	$ 992.50
Randy Jackson	:	$ 1,548.60
James Taylor	:	$ 8,347.86

2. The Company shall pay the individuals named in Paragraph 1 above the amount due them within 30 days of the issuance of this Award. The Company shall seek the Union's assistance in locating and delivering payment to any named individual who is no longer employed by the Company.

3. Inasmuch as the Arbitrator has billed the Union the full costs for the remedial portion of this case, including the hearing held on December 30, 1996 and the time spent in preparation of this Opinion and Award, the Company is hereby directed to reimburse the Union its share of these arbitration costs, consistent with Article X(L) of the Collective Bargaining Agreement, which states: "All expenses of the arbitration shall be shared equally by the Employer and the Union. . . ." The amount to be paid to the Union is $1,056.00.

February 13, 1997

s/ Joan Parker
Joan Parker
Arbitrator

APPENDIX E — OPINION AND AWARD OF THE AMERICAN ARBITRATION ASSOCIATION DATED SEPTEMBER 12, 1996

AMERICAN ARBITRATION ASSOCIATION
CASE NO. 13 300 00817 93

In the Matter of the Arbitration

Between

LOCAL 209, NABET-CWA, AFL-CIO

and

WWOR-TV, INC.

Opinion and Award

Re: NABET Case No.
WWOR-93-8

Before: Joan Parker
Arbitrator

* * *

The grievance at issue was filed on May 10, 1993. It alleges as follows:

> The Company is in violation of section 12.04, and all other relevant sections of the collective bargaining agreement, as well as past practice, by failing to reinstate in inverse order of layoff, Employees to the job grouping from which they

were previously laid off. The Union demands that the Company fill any and all vacancies in job groupings from which Employees have been laid off by rehiring, in inverse order of layoff, Employees with rehire rights who have been laid off from such job group. The Union demands that it and its members in all respects be made whole.

(Jt. Ex. 1).

Section 12.04 provides as follows:

Section 12.04 — Rehiring

If a vacancy shall occur in any job grouping from which any Employee was previously laid off, the Employer will reinstate, in the inverse order of layoff, any former Employee to the job grouping from which he was previously laid off, provided, however, and upon condition that:

(a) Such Employee has the skill and ability to fill such vacancy at such time;

(b) Such Employee, within ten (10) business days after receipt via Certified Mail, Return Receipt Requested, of such notice by him of such vacancy, notifies the Employer by Certified Mail, Return Receipt Requested, of his willingness to fill such vacancy; and

(c) Such Employee actually reports for work within fourteen (14) business days after receipt of

> such notice to him of such vacancy. In no event, however, shall any former Employee be entitled to the benefits of the provisions of this Section 12.04 if he has accumulated less than six (6) months of seniority, or after a lapse of twenty-four (24) months from the date of layoff if such Employee then had less than five (5) years seniority, or after the lapse of thirty (30) months from the date of layoff if such Employee then had five (5) or more years seniority.

A hearing was convened on December 28, 1993. Thereafter, and over the course of almost two years, the parties made several attempts to resolve the grievance. At their request, the Arbitrator served as Mediator in an effort to bring about a settlement. Regrettably, a resolution was not achieved.

On January 25, 1995, the Union rested its case-in-chief without having presented any testimonial evidence. The Company then requested an opportunity to file a Motion to Dismiss. The Arbitrator granted the Company's request, and also gave the Union the right to submit a reply. The Company's Motion to Dismiss was received by the Arbitrator as of March 24, 1995, and the Union's response was received as of April 7, 1995.

In an Interim Opinion, dated October 14, 1995, the Arbitrator denied the Company's Motion to Dismiss and found that, based on undisputed facts in the Record, the Union had established a *prima facie* case. Among these facts were that on April 23 and May 7, 1993, the Company laid off nine employees at WWOR-TV and instructed them to report to work the next working day. The Company did not reinstate these employees under Section 12.04 of the Agreement; rather it brought them

back as temporary employees. Undisputedly, some of these employees returned to work for lengthy and indefinite periods of time and performed their regular work during their former regular hours.

The Union's major contention has been that the openings that the Company filled with the laid off employees were, in fact, vacancies within the meaning of Section 12.04. The Arbitrator's Interim Opinion found:

> The fact that the very same employees who were laid off were hired the next day to perform their former job functions within the same job grouping from which they were laid off establishes a *prima facie* case. The Company treated these employees as temporary employees rather than regular employees. Therefore, it is now the Company's burden to prove why these employees were treated as temporary employees; that is, to demonstrate that the openings they filled were not vacancies within the meaning of Section 12.04 and that the nature and duration of their assignments, in fact, were temporary and therefore not subject to the provisions of Section 12.04.
>
> (AAA Case No. 13 300 00817 93, October 14, 1995, at 13).

The Arbitrator reconvened the hearing on May 28, 1996. At that time, the Company rested its case without calling any witnesses. The Union then announced its intention to adduce testimony, and the Company vehemently objected, given that (1) the Union had rested its case on January 25, 1995; (2) the

Company had produced no testimonial or documentary evidence to rebut; and (3) the Union had previously represented that, in any event, it would have no rebuttal. The Company further indicated that it would not participate in the hearing if the Union were permitted to adduce testimony at that point.

The Arbitrator advised the parties that in light of her prior decision finding that the Union had put forward a *prima facie* case, and based on the Company's failure to respond with testimony or evidence on the merits, she would issue an award in the Union's favor. She further advised the parties that pursuant to an agreement between their legal counsel, as reflected in correspondence dated October 13, 1995, she would make no determination as to remedy at that time, but rather, would defer such a determination until after a hearing on the issue of "damages" or other relief that might be due the grievants. The Arbitrator's Award below confirms this ruling.

Award:

> BASED UPON THE ARBITRATOR'S INTERIM AWARD, DATED OCTOBER 14, 1995, IN WHICH SHE FOUND THAT THE UNION HAD ESTABLISHED A *PRIMA FACIE* CASE, AND IN LIGHT OF THE COMPANY'S FAILURE TO RESPOND TO THAT CASE WITH ANY TESTIMONY OR EVIDENCE ON THE MERITS, THE GRIEVANCE IS HEREBY SUSTAINED. PURSUANT TO A SUGGESTION BY THE COMPANY, WHICH WAS ACCEPTED BY THE UNION, THE ARBITRATOR WILL NOT RENDER A DECISION AS TO REMEDY AT THIS TIME. RATHER, A SEPARATE HEARING

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WILL BE SCHEDULED IN ORDER TO AFFORD THE PARTIES OPPORTUNITY TO PRESENT TESTIMONY, EVIDENCE, AND ARGUMENT AS TO THE RELIEF, IF ANY, THAT IS DUE THE AFFECTED GRIEVANTS.

September 12, 1996

s/ Joan Parker
Joan Parker
Arbitrator

APPENDIX F — INTERIM OPINION OF THE AMERICAN ARBITRATION ASSOCIATION DATED OCTOBER 14, 1995

AMERICAN ARBITRATION ASSOCIATION
CASE NUMBER 13 300 00817 93

In the Matter of the Arbitration

Between

LOCAL 209, NABET, CWA, AFL-CIO

and

WWOR-TV, INC.

Interim Opinion

Re: Employer's Motion to Dismiss

Before: Joan Parker
Arbitrator

Pursuant to the grievance arbitration rules of the American Arbitration Association, the undersigned was designated to serve as Arbitrator in the instant matter.

The grievance at issue was filed on May 10, 1993. It alleges as follows:

> The Company is in violation of section 12.04, and all other relevant sections of the collective bargaining agreement, as well as past practice, by failing to reinstate, in the inverse order of layoff,

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Employees to the job grouping from which they were previously laid off. The Union demands that the Company fill any and all vacancies in job groupings from which Employees have been laid off by rehiring, in inverse order of layoff, Employees with rehire rights who have been laid off from such job group. The Union demands that it and its members in all respects be made whole. (Jt. Ex. I).

Section 12.04 provides as follows:

Section 12.04 — Rehiring

If a vacancy shall occur in any job grouping from which any Employee was previously laid off, the Employer will reinstate, in the inverse order of layoff, any former Employee to the job grouping from which he was previously laid off, provided, however, and upon condition that:

(a) Such Employee has the skill and ability to fill such vacancy at such time;

(b) Such Employee, within ten (10) business days after receipt via Certified Mail, Return Receipt Requested, of such notice by him of such vacancy, notifies the Employer by Certified Mail, Return Receipt Requested, of his willingness to fill such vacancy; and

(c) Such Employee actually reports for work within fourteen (14) business days after receipt of such notice to him of such vacancy. In no event,

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> however, shall any former Employee be entitled to the benefits of the provisions of this Section 12.04 if he has accumulated less than six (6) months of seniority, or after a lapse of twenty-four (24) months from the date of layoff if such Employee then had less than five (5) years seniority, or after the lapse of thirty (30) months from the date of layoff if such Employee then had five (5) or more years seniority.

A hearing was convened on December 28, 1993. During that proceeding, the Company requested an adjournment in order to assess whether to seek a stay of arbitration, in light of what the Company perceived to be an attempt by the Union to expand the scope of the grievance in an effort to challenge the legality of layoffs that were effectuated in April and May of 1993. The Arbitrator granted the requested adjournment.

The hearing resumed on June 8, 1994, after the Company decided not to attempt to stay the proceeding. At the outset of the hearing, however, the Company submitted a Motion to Dismiss and, in the alternative, a Motion *In Limine*. The Motion to Dismiss alleged that the instant grievance was non-arbitrable in that it was encompassed by a prior Consent Award issued by Arbitrator Ralph Berger resolving essentially the same issue. Through the Motion *In Limine*, the Company sought to exclude from the Record of the instant proceeding and any all evidence which might be offered as probative of the legality of the prior Company layoffs, given the Union's expressed disavowals of any reliance upon Section 12.03 of the Agreement.[1]

---

1. Section 12.03 Provides:

Section 12.03 — Layoffs

> The necessity for layoffs and reductions of staff shall be in the discretion of the Employer. In the case of a layoff

(Cont'd)

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After reviewing the Company's Motion to Dismiss and affording the parties opportunity for oral argument, the Arbitrator denied the Company's Motion to Dismiss, ruling that there was insufficient evidence in the Record to support the conclusion that the Union was, in fact, seeking to re-litigate the same issue concerning Section 12.04 of the Agreement as was covered by the Berger Consent Award. The Arbitrator made no ruling at that time concerning the Company's Motion *In Limine*.

Much of the June 8th hearing was consumed by the parties, unsuccessful effort to reach agreement as to precisely what issue was to be arbitrated. As a result of off-the-record discussions, however, the parties ultimately invited the Arbitrator to serve as Mediator and to assist them in an effort to settle the grievance.[2]

Thereafter, the parties endeavored to resolve this dispute through mediation sessions, which were held on June 9, June 23, and August 17, 1994. A final mediation session was scheduled for January 25, 1995, but at the outset of that meeting,

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(Cont'd)

> or reduction of staff the Employee with the least seniority in the particular job grouping of those Employees having seniority rights shall be laid off first. The Employer shall give at least; two (2) weeks notice in advance in writing to the Union and to each Employee affected in connection with any proposed layoff, or in lieu thereof, make payment to such Employee to the extent of failure to give such notice.

2. The parties further agreed that the Arbitrator would retain jurisdiction over the matter in the event that mediation proved fruitless, and that neither party would be prejudiced in any manner by participating in the mediation process.

the Union announced that it no longer wished to participate in mediation, and it requested that the arbitration go forward. When the Arbitrator responded that in light of the circumstances, the arbitration hearing would resume, the Union stated that it was resting its case-in-chief. The Company then requested an opportunity to file the instant Motion to Dismiss, to be postmarked no later than March 17, 1995. The Union did not oppose this request, but sought opportunity to file a reply. The Arbitrator granted the Company's request and also granted the Union the right to submit a response, to be postmarked no later than April 3, 1995.

The parties further agreed that in the event the Arbitrator eventually sustained the grievance, the language of Section 12.04(c), which cuts off the benefits of Section 12.04 after a lapse of either 24 or 30 months following the date of layoff, depending upon an employee's seniority, would be waived for that period in which the parties were in mediation; i.e., June 8, 1994 to January 25, 1995. By letter dated October 13, 1995, the Company proposed to extend the above-described period from June 8, 1994 until the date the Arbitrator ruled on the Company's Motion to Dismiss. The Union agreed to the Company's proposal by letter dated October 13, 1995. Thus, in the event the Arbitrator awards a remedy in this matter, the period between June 8, 1994 and October 14, 1995 will not be included in any computation of "lapsed" time under Section 12.04(c).

Contentions of the Company:

As the Company understands this grievance, the Union's "only real contention" is that the Company has violated the Agreement "by employing laid off employees on a temporary

weekly basis, without regard to seniority." (Motion to Dismiss, pp. 4-5). The Company emphasizes, however, that the Agreement is silent on this issue; nowhere does it obligate the Company to employ temporary employees on a weekly basis in the absolute inverse order of seniority. Furthermore, while Section 12.04 deals with reinstating laid off employees in the inverse order of layoff, that section does not apply to the employment of laid off employees on a temporary basis. Accordingly, the Company seeks dismissal of the instant grievance on the grounds that the Union has failed to state a *prima facie* case of any Section 12.04 violation.

Section 12.04 requires WWOR, in the event of a "vacancy" in a particular job grouping, to "reinstate" laid off employees in the inverse order of layoff, provided certain conditions are met (i.e., that the employee selected for reinstatement possesses the requisite "skill and ability" and that the designated employee satisfies specified procedural "mechanics" to reinstatement, including accepting or rejecting the offer of reinstatement within a certain period of time). The Company submits that a critical aspect of the Union's *prima facie* burden of showing a Section 12.04 violation by the Company is the Union's obligation to demonstrate, in the first instance, that Section 12.04 applies at all to temporary employees. In order to prove this, the Union must first show that a genuine "vacancy" actually occurred.

The Company asserts that in the employment context, "vacancy" means "an unoccupied position . . . an unfilled post, situation or job." Arbitrators have consistently held that a job vacancy occurs when an employee permanently ceases to occupy a position, as in the event of resignation, retirement or death. A vacancy is not filled, submits the Company, when a

employer uses temporary employees to cover short-term absences. Moreover, arbitrators have long held that in the absence of any contrary contract language, the Employer has the right to determine when a vacancy exists and whether it shall be filled.

In the instant case, the Company contends that no true vacancy occurred; that is, no triggering event occurred to create a vacancy. Nor was there any obligation for the Company to fill any openings, which the Union may characterize as "vacancies." In this Agreement, the Company has retained the sole and exclusive right to determine the number and type of employees required and to establish employee work schedules and assignments. Therefore, the Union may not second guess the Company in its decision to employ laid off employees temporarily on a weekly basis without regard to seniority status.

The Company further contends that its position regarding Section 12.04 is supported by other provisions of the Agreement. Section 5.04, for example, permits the Company to employ employees for vacation relief or temporary employment on a weekly basis. Section 5.04 also expressly provides that Section 12.04 does not apply to "other than regular non-probationary employees." Hence, Section 12.04 does not apply to temporary weekly employees. Furthermore, it is undisputed that the Company may employ temporary employees on a daily basis. This right is expressly recognized in Section 5.06.

It is the Company's additional position that even-assuming *arguendo* that the Union could satisfy the "vacancy" requirement of Section 12.04, its establishment of a *prima facie* case is undermined by the "mechanics" of Section 12.04. These

mechanics, or procedural steps, require that the employee selected for reinstatement, after receiving the Company's notice of a vacancy by certified mail, has ten business days to notify the Company of his willingness to fill the vacancy and fourteen business days actually to report for work. The Company emphasizes that the employment of temporary employees on a weekly basis does not lend itself to the mechanics of Section 12.04. Moreover, making the procedural aspects of Section 12.04 applicable to temporary employment on a weekly basis would essentially render Section 5.04, as well as other contractual provisions, meaningless.

The Company further argues that even if Section 12.04 did apply to laid off employees temporarily employed on a weekly basis, the Union has failed to make a *prima facie* case showing that the requirements of section 12.04 have been met. The Union offered no proofs as to the skills and abilities of the temporary weekly employees, most notably, those less senior employees who were hired to perform the available work. Additionally, the notice and appearance requirements of Section 12.04(b) and (c) were not met by the laid off employees, nor could they have been met, given the Company's need to fill weekly jobs on short notice. In sun, the fact that the procedural conditions of Section 12.04 were not, and could not, have been met in the circumstances at issue, proves that Section 12.04 was never intended to apply to the employment of weekly temporary employees.

Contentions of the Union:

The Union contends that it has presented a *prima facie* case based upon stipulated facts in the Record. It is undisputed that on April 23 and May 7, 1993, nine employees at WWOR-TV

were laid off and were instructed to report to work the next working day. The Company did not reinstate them under Section 12.04, but rather, had them return as temporary employees. The Union contends that these facts establish that the layoffs created "vacancies" within the meaning of Section 12.04 and that the Company violated the Agreement by not reinstating the affected employees in inverse order of layoff.

The Union submits that while the Company has elected to call the rehired employees "temporary", these individuals were, in fact, reinstated regular employees, performing their regular work during their regular hours over a protracted period of time. The Company, however, has refused to treat them as regular employees and has denied them all of the contractual benefits of regular employees.

The Union acknowledges that Section 12.04 does not apply to weekly temporary employees. Its position is that the grievants were not weekly temporary employees. Rather, they were regular employees who meet the conditions of Section 12.04. Manifestly, they had the skill and ability to fill the vacancies to which they were assigned; each of the employees was laid off in the same job grouping to which he was ultimately assigned. The notice requirement of section 12.04(b) was irrelevant because the undisputed facts are that the employees returned to work the next day, thereby demonstrating their willingness to fill the vacancies. Similarly, Section 12.04(C) is inapplicable in this context, inasmuch as the employees returned to work the day after their layoff and did not need to exercise their right to report to work within fourteen days.

Contrary to the Company's assertion that the Union does not meet its *prima facie* burden unless it first demonstrates that

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Section 12.04 applies to all temporary weekly employees, the Union insists that such an exercise would be pointless because (1) the grievants here were not temporary weekly employees and (2) Section 12.04 does not apply to temporary weekly employees. Furthermore, it is undisputed that a layoff occurred pursuant to Section 12.03. Therefore, in the Union's view, the Company's effort to show that a vacancy did not occur is "surplusage and a fruitless attempt to get out from under what is apparently its burden to show why it treated regular employees as temporary employees." (Union Reply to Motion to Dismiss, p.3).

In sum, the Union asserts that the fact that the Company defined the grievants as temporary employees and stripped them of their benefits and seniority, did not, in fact, mean that they were temporary employees under the Agreement. The Company should have treated the grievants as reinstated regular employees. As the Union sees it, the Company has the burden to prove why it treated the grievants as temporary employees rather than regular employees.

Therefore, the Motion to Dismiss should be denied.

Opinion:

Throughout its Motion to Dismiss, the Company has attacked the Union for failing to prove contentions which the Union has never made in this proceeding. For example, the Union recognizes management's right to determine staffing needs and to effectuate layoffs when, in its judgment, they are necessary. Likewise, it is undisputed that Section 5.04 of the Agreement provides that vacation relief and temporary employees may be offered temporary weekly employment

without acquiring regular status or seniority standing under the Agreement. Also unchallenged is the fact that Section 5.06 permits the Company to employ temporary daily employees pursuant to specified conditions. Finally, and most significantly, the Union does not contend that Section 12.04 applies to temporary weekly employees. The Union agrees with the Company that essentially, Section 12.04 requires WWOR, in the event of a vacancy in a particular job grouping, to reinstate laid off employees in the inverse order of layoff, provided certain conditions are met.

Thus, the Company's effort to demonstrate the Union's failure to prove the applicability of Section 12.04 to temporary weekly employees in a meaningless exercise. Also lacking probative value is the Company's citation of cases that address the issue of when a vacancy is or is not filled using temporary employees.

Throughout this proceeding, the parties have appeared to be unable to develop a mutual understanding of what the Union's grievance is all about. To make it clear, this grievance concerns an alleged subterfuge. It is the Union's position that the Company created vacancies by laying off employees pursuant to Section 12.03 and then rehiring them the very next day to perform the very same functions in the same job groupings from which they were laid off, but without contractual benefits. The Union further claims that the Company mischaracterized the laid off employees as temporary employees rather than reinstated employees and therefore violated Section 12.04 by not rehiring them in inverse order of layoff and by denying then seniority status.

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In order for this grievance to be sustained, the Union must prove that regardless of how the grievants were categorized and treated, the way in which they were laid off, recalled, and subsequently reassigned qualified them as reinstated, regular, employees, subject to the provisions of Section 12.04.

The parties agree that on April 23 and May 7, 1993, nine employees at WWOR-TV were laid off and were instructed to report to work the next working day. The Company did not reinstate these employees under Section 12.04, but had them return to work as temporary employees. At least some of these employees came back to work for lengthy and indefinite periods of time and performed their regular work during their former regular hours. The Union contends that the layoff of these employees created the vacancies which they, in fact, filled and that the only dispute between the parties is the Company's refusal to treat these employees as regular employees.

It is the Arbitrator's conclusion that based upon the Record established thus far in this proceeding, particularly lengthy on-the-record discussions between the parties' counsel as to what was at issue, the Union has established a *prima facie* case. This *prima facie* case does not hinge on the Union's proving that Section 12.04 is applicable to temporary weekly employees because, as noted above, the Union does not contend that Section 12.04 is applicable to temporary weekly employees. The Union contends that the openings that the Company filled with the laid off employees were, in fact, vacancies within the meaning of Section 12.04. The fact that the very same employees who were laid off were hired the next day to perform their former job functions within the same job grouping from which they were laid off establishes a *prima facie* case. The Company treated these employees as temporary employees

rather than regular reinstated employees. Therefore, it is now the Company's burden to prove why they employees were treated as temporary employees; that is, to demonstrate that the openings they filled were not vacancies within the meaning of Section 12.04 and that the nature and duration of their assignments, in fact, were temporary and therefore not subject to the provisions of Section 12.04.

The Arbitrator recognizes that pursuant to Section 12.03, "the necessity for layoffs and reductions in staff shall be in the discretion of the Employer". Therefore, the Union may not challenge the legality of the layoffs that were imposed in April and May of 1993. The Union is free, however, to argue that the layoffs created vacancies within the meaning of Section 12.04, and that the shifts the grievants were given and the work that they performed entitled them to reinstatement under Section 12.04, regardless of the fact that the Company attempted to clothe them with the attributes of temporary employees.

Based upon the foregoing opinion, the Arbitrator denies the Company's Motion to Dismiss and shall schedule the resumption of the arbitration hearing.

***AWARD*:**

MOTION DENIED.

October 14, 1995

s/ Jean Parker
Jean Parker
Arbitrator